



Commonwealth of Massachusetts

DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT

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Guidelines for Housing Programs in Which Funding is Provided Through a Non-Governmental Entity

1. Summary

These guidelines are established for housing programs where funding is provided by a non-governmental entity in accordance with 760 CMR 31.01 2(g) and 31.09 (3) for the administration of low or moderate income housing that is developed with a comprehensive permit using the program of a subsidy agency that uses non-governmental entities to provide the funding. These guidelines are intended to facilitate production of such housing subsidized by eligible subsidy agencies that do not offer funding or financing directly, but that provide funding through private financial institutions. The Federal Home Loan Bank of Boston is one such eligible subsidy agency, which at this time provides funding through member banks for its New England Fund for production of low or moderate-income housing.

2. Background

M.G.L. Chapter 40B, sections 20-23 (also known as Chapter 774 of the Acts of 1969 or the Comprehensive Permit Law) created a local process for granting "comprehensive permits" for the construction of subsidized low or moderate income housing. These permits, which may supersede local requirements and regulations including zoning, are granted on a case-by-case basis by local zoning boards of appeals (ZBAs) following a public hearing. In a city or town where less than ten percent of the housing stock is low or moderate income housing (as defined in section 21 and the Department's regulations), the denial of a comprehensive permit application by a ZBA or the imposition of conditions that render a proposed low or moderate income housing development uneconomic may generally be appealed to the state Housing Appeals Committee.

Chapter 40B defines low and moderate income housing as "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing". "Low or moderate income housing" provides housing to households earning no more than 80 percent of the area median income.

In 1998, the Housing Appeals Committee (HAC) determined in a decision known as the Stuborn Case that the Federal Home Loan Bank of Boston (FHLBB, also referred to as a "subsidy agency") is a subsidy agency authorized legislatively, which performs a governmental function and which is supervised by a federal agency (the Federal Housing Finance Board). The HAC ruled that the FHLBB's New England Fund ("NEF") program is a qualifying low or moderate income-housing program, which requires that no less than 25% of the housing must serve households earning less than 80% of area median income, guaranteed by a long-term use restriction. The NEF program provides its funding through NEF member banks (also referred to as "non-governmental entities" in these guidelines.)

Unlike conventional housing subsidy programs, in which a state or federal agency administers and approves every aspect of financing, design and construction, the FHLBB does not impose such oversight in the New England Fund. Therefore, in the NEF program, many of these decisions were left to the local ZBA.

The real estate market in the late 1990s and thereafter made real estate development financially attractive. Developers seeking to overcome local barriers to low or moderate-income housing turned to the flexibility offered by the Comprehensive Permit Law. As a result of the Stuborn Case, the NEF became a funding source and NEF member banks began issuing site approval letters for low or moderate-income housing developments. This resulted in multiple applications to many ZBAs for comprehensive permits. Most municipalities did not have local standards that detailed reasonable requirements for low or moderate-income housing development, and many did not have the capacity to undertake the responsibilities of administering such housing once built.

Accordingly, DHCD deems the New England Fund to be a qualifying program and promulgated 760 CMR 31.01 (2)(g) which states

If project funding is provided through a non-governmental entity, a public or quasi-public entity authorized by the Department (DHCD) shall make the determination of Project Eligibility (Site Approval). The designated entity that issued the Project Eligibility (Site Approval) determination shall administer the project thereafter as specified in program guidelines issued by the Department...”

and 760 CMR 31.09(3) which states in pertinent part:

...If project funding is provided through a non-governmental entity, the state agency providing the determination of Project Eligibility (Site Approval), shall issue the final approval.

These guidelines are the “program guidelines” referenced in 760 CMR 31.01(2)(g).

3. Purpose

The need for affordable housing is as acute today as it was in 1969 when Chapter 40B, the Comprehensive Permit Law, was enacted. The purpose of Chapter 40B is to stimulate the production of affordable housing in conjunction with a state or federal subsidy program that provides proper safeguards and controls. Resources to assist in the development of affordable housing are limited, and those that are provided by, or as in the case of the FHLBB, used in conjunction with subsidy agencies, are essential to the production of affordable housing. These guidelines are intended to establish a procedure to allow participation by non-governmental entities and leverage their resources, while ensuring that the process by which developments are negotiated, built, sold and remain affordable are consistent with the spirit of the statute.

These guidelines set out procedures to enable development of low and moderate income housing using funding provided through non-governmental entities and utilizing the flexible zoning and local approval process provided by Chapter 40B. 760 CMR 31.09(3) requires that the Department identify qualified public or quasi-public agency(-ies) to serve as the Project Administrator discussed in these guidelines. These guidelines ensure that a substantial percentage of units will serve low or moderate income households, that the units will be subject to long-term use restrictions, that units will be openly and fairly marketed, that developers will realize a reasonable return on their investment, and that the development will be monitored over the term of the use restriction by the Project Administrator.

The role of the Project Administrator is to facilitate and guide projects developed in conjunction with non-governmental entities. These guidelines are intended to establish a process to ensure fair and open negotiation, and quality of construction. The role of the Project Administrator is not intended to supersede the jurisdiction of the Housing Appeals Committee or be a substitute for decisions more appropriately made as part of a negotiation between a developer and a municipality. It is intended rather that the Project Administrator facilitate a process that benefits and serves the needs of both the municipality and the developer.

These guidelines will govern administration of housing programs in which funding is provided by a non-governmental entity. To the extent that these guidelines are silent on a particular matter, the policy of the Project Administrator will prevail. Prior to approving an entity as a Project Administrator, DHCD will review relevant Project Administrator policies for its approval. To the extent that a relevant policy of a Project Administrator changes, the Project Administrator will submit the proposed policy to DHCD for its review and approval. A new policy will not take effect in housing programs in which funding is provided by a non-governmental entity until DHCD has granted such approval.

4. General Requirements

In order to qualify for a comprehensive permit where funding is provided through a non-governmental entity, a project must meet the following minimum requirements:

- (1) At least 25 percent of the units in the proposed project must be affordable to households earning a maximum of 80 percent of area median household income; or alternatively, at least 20 percent of the units in the proposed project must be affordable to households earning a maximum of 50 percent of area median income; there also shall be reasonable asset limits for such households;
- (2) The affordable units must be subject to a long term use restriction enforceable under a regulatory agreement with a Project Administrator in a form approved by DHCD (see "Regulatory Agreements");
- (3) The affordable units must be marketed through a fair and equitable process in compliance with state and federal fair housing laws, and a lottery process as described in these guidelines generally should be used;
- (4) The Project Administrator shall ensure supervision of the project during construction; and

- (5) Provision shall be made for effective monitoring and enforcement of the use restriction and regulatory agreement during the term of affordability.

5. Application for Project Eligibility (Site Approval)

Where a developer seeks a comprehensive permit and the project funding will be provided through a non-governmental entity, a public or quasi-public entity authorized by DHCD (the Project Administrator) shall make the determination of Project Eligibility (Site Approval). DHCD shall maintain a public list of Project Administrators. A developer may choose the Project Administrator to which it applies.

An application for a determination of project eligibility must include the name and address of the applicant, the address of the site and site description, including its characteristics and infrastructure, the number, size and type of housing units proposed, the name of the housing program under which project eligibility is sought, relevant details of the particular project, including the percentage of units for low and moderate income households, income and asset eligibility standards, total land area and units per acre, the duration of the use restrictions, the limited dividend status of the developer, and other information required by the Project Administrator.

6. Determination of Project Eligibility (Site Approval)

In determining Project Eligibility (Site Approval) the Project Administrator must make the following findings:

- 1) that the proposed project appears generally eligible under the requirements of the housing program, subject to final review of eligibility and to final approval;
- 2) that the Project Administrator has performed an on-site inspection of the site and has reviewed pertinent information submitted by the applicant, the municipality, and others (if any);
- 3) that the proposed housing design and land use plan are generally appropriate for the site and for the site location in which the site is located;
- 4) that the proposed project appears financially feasible within the housing market in which it will be situated (based on comparable rentals and/or sales figures);
- 5) that an initial pro forma has been reviewed and the project appears financially feasible on the basis of estimated development costs (there shall be a presumption that the project is financially feasible once the preliminary funding approval has been granted by the non-governmental entity);
- 6) that the proposed financing is reasonable and profit is properly limited; and
- 7) that the developer is financially responsible and meets the general eligibility standards of the housing program.

In addition to the foregoing, a Project Administrator may consider the following in making a determination of project eligibility:

- overall density and size
- the degree of affordability

- environmental impact (including principles of “smart growth”)
- community impact and consistency with local housing need
- impact of other pending applications for housing development

The purpose of low or moderate-income housing development programs is to address state, regional and local housing needs. There is a critical need in the Commonwealth for all types of housing, but particularly for family and special needs housing. The Project Administrator shall encourage development of such housing.

7. Process for Determining Project Eligibility (Site Approval)

In conjunction with the comment period pursuant to 760 CMR 31.01(2) (d), a site visit and project review meeting will be scheduled by the Project Administrator which is considering an application for a determination of Project Eligibility (Site Approval). The Project Administrator may invite the developer and representatives of the municipality to participate in the site visit and project review meeting.

The purpose of the site visit is to help develop a full understanding of the developer's proposal and how it relates to the site, neighborhood and local conditions. The project review meeting is a forum in which to discuss:

- (1) concerns related to the proposed project,
- (2) issues that could assist the developer in meeting the requirements of the program and addressing legitimate concerns of the municipality, and
- (3) information that will help the municipality understand the nature and scope of the proposed project and key issues that the Project Administrator may consider as part of its determination of Project Eligibility (Site Approval).

These issues may include (but may not be limited to) the issues set out in the prior section. Additional scrutiny may be given to operating budgets, environmental issues, land valuation, marketing, financing, development scheduling, developer qualifications, handicapped access and/or provision for the disabled and other concerns related to the project.

In issuing a determination of Project Eligibility (Site Approval) the Project Administrator may require revisions or amendments to the project in order to meet program objectives. The revised or amended project, as so approved, shall thereafter be considered the project. The Project Administrator shall state the name of the state or federal low-income housing construction program under which it has made its determination of Project Eligibility (Site Approval).

8. Applications for Comprehensive Permits

After the Project Administrator has issued a determination of Project Eligibility (Site Approval) for a project, the developer shall submit a copy to the non-governmental entity from which the developer will seek funding. This entity shall make a determination as to whether it will provide preliminary funding approval pursuant to the state or federal low-income housing construction program specified in the determination.

Thereafter the developer may apply for a comprehensive permit with the ZBA having jurisdiction. The application shall meet the requirements of 760 CMR 31.02 (2). At the time of application, the developer shall provide a copy of the application to the Project Administrator. The application to the ZBA shall include the following:

- (1) Determination of Project Eligibility (Site Approval).
- (2) Documentation of the developer's interest in the site (i.e., a deed, option or purchase and sale agreement).
- (3) A site plan showing the location of the development in the municipality, topographical changes, including roads, parking, grade changes, location and footprints of buildings and other site changes.
- (4) Information regarding the relationship of the project with local or regional plans.
- (5) Elevations (or sample building types) and floor plans (or sample floor plans).
- (6) Information on rents and/or sales prices of affordable units and market units, the number, bedroom size and location of affordable and market units.

The Project Administrator shall be kept informed by the developer about the progress of the hearing on the application before the ZBA. In the event revisions or amendments to the project are required or requested by the ZBA, and they are reasonable and appropriate, the Project Administrator shall approve any such revisions or amendments prior to or as part of its final approval.

9. Final Approval

Following the issuance of a comprehensive permit and prior to construction, the developer shall submit revised, preliminary plans to the Project Administrator reflecting any revisions or amendments to the project required by the comprehensive permit or otherwise necessary for the financing and construction of the project. With these plans the developer shall submit a signed regulatory agreement in the form prescribed by the Project Administrator which shall ensure compliance with program requirements and the requirements of these guidelines, including monitoring of construction, imposition of effective use restrictions, monitoring of compliance with the provisions of the use restriction and regulatory agreement during the term of affordability, and effective enforcement of such provisions in the event of noncompliance.

The Project Administrator shall grant final approval to the project if the project, as it may have been revised and amended, still meets the program requirements and financing standards set out above pursuant to which the Determination of Project Eligibility (Site Approval) was made. Issuance of a comprehensive permit by the Housing Appeals Committee shall be considered evidence of compliance with program requirements with respect to matters of local concern.

Following issuance of final approval, the developer may secure a building permit and any other necessary approvals and permits (not waived in the comprehensive permit) in order to commence construction. During construction the Project Administrator shall monitor compliance in the manner set out in the Regulatory Agreement. In the event of any noncompliance with the plans, financial undertakings or other matters in the Regulatory Agreement, upon notice from the Project Administrator, the developer shall cure any such noncompliance forthwith. Sanctions for noncompliance may be provided in the Regulatory Agreement. In the event of

noncompliance the developer shall pay all of the Project Administrator's costs, including reasonable attorneys' fees, in securing a cure for such noncompliance.

10. Minimum Design and Construction Standards

Low or moderate-income housing units in a project should not be readily identifiable as such. However, the Project Administrator may approve developments that reasonably balance the provision of decent, affordable housing with the site and market conditions associated with the specific development proposal. For example, while affordable units may not be the same size as market-rate homes, they should be of similar style and have a uniform exterior quality for both affordable and market units. The affordable units should be reasonably interspersed with the market units.

In the event the Project Administrator permits market rate units to be distinguishable in size or in appearance from affordable units the developer and Project Administrator shall make an effort, insofar as financially feasible, to provide for an increased number of affordable units, increased affordability of the units for low or moderate income households, increased unit size of the affordable units or a combination of these factors. The Project Administrator shall determine whether such an increase warrants the differential in size or in appearance. Even if affordable units are distinguishable these units shall be fully integrated into and interspersed in the development so as to prevent easy identification. For example, in projects comprised of detached single-family dwellings, this result could be accomplished by situating affordable units for two families (with a project total of affordable units higher than the minimum required) within structures that have comparable exteriors to the single-family market rate units.

While the low and moderate-income units need not be given the same interior finishes and amenities as the market rate units, the interiors shall be of good quality. Interiors shall be completely finished prior to occupancy.

Development proposals that have low and moderate-income units with two or more bedrooms are encouraged. Studio units or one-bedroom units may be approved where consistent with the type of housing proposed and the regional housing need. Where site and location are appropriate for families with children, it is recommended that at least 50% of the low and moderate-income units be for families or large households and have three or more bedrooms.

Housing developed through the program must comply not only with the State Sanitary and Building Codes, but also with other state building and environmental regulations, and (to the degree not exempted by a comprehensive permit) with all applicable local codes, ordinances and bylaws. In the event that the development is built in phases, each phase shall contain a proportionate number of affordable and market units.

11. Environmental Standards

It is important for developers to bear in mind that there is consistency between G.L. c. 40B and meeting environmental concerns. (G.L. c. 40B § 20). Consistency with local needs requires a balancing between the regional need for affordable housing and, among other factors, "...environment, design, open space, and other matters of local concern." 760 CMR 31.06(2).

For new construction projects, developers are encouraged to pursue development plans that promote quality residential development in already developed areas including “infill” development and development near transportation centers. In communities with significant undeveloped land and incomplete infrastructure, developers are encouraged to apply land planning methods that minimize environmental impacts while increasing housing density beyond that normally created under conventional zoning.

Creative land use designs which reduce infrastructure costs and minimize adverse environmental impacts and/or maximize resident recreational areas and meaningful open space shall be pursued whenever reasonably possible.

12. Regulatory Agreements

There shall be a regulatory agreement in the form approved or specified by the Department in which a developer agrees to develop low or moderate income housing in accordance with use restrictions. These use restrictions may be included as part of the regulatory agreement for rental and cooperative projects. For rental or cooperative housing, the regulatory agreement shall require a developer/owner/manager to operate and manage the housing in accordance with the use restrictions and other material terms and shall provide for effective monitoring, administration and enforcement of the regulatory agreement during the term of affordability. For ownership housing, the regulatory agreement shall specify the terms of development and require the developer/owner/manager to impose an approved use restriction on each low or moderate-income unit at the time of initial sale of the unit. There shall be a provision in the regulatory agreement in which the developer shall agree to the following:

- (a) For rental housing, developers fees, overhead, profits, dividends and any other distributions to developers, development consultants, partners or legal or beneficial owners shall be subject to limitations as follows:

Distributions from Capital Sources: Payment of fees and profits will be limited to no more than ten percent of total development costs (see Section 17) net of (i) such fees and profits; and (ii) any working capital or reserves intended for property operations.

Distributions from Operations: Commencing upon the development's initial occupancy and each year thereafter, annual dividend distributions will be limited to ten percent of the owner's equity in the project. Owner's equity, which may be revised from time to time pursuant to terms of the Regulatory Agreement, shall consist of the difference between the appraised as-built value of the development and the sum of any public equity and secured debt on the property. Public equity includes HOME, CDBG, linkage, or other public funds, whether structured as a grant or soft loan.

Distributions shall be permitted with respect to each fiscal year of the project commencing on the date of initial occupancy only after all current and owed-to-date project expenses have been paid and reserves, then due and owing, have been funded. A determination of the amounts available for distribution shall further be subject to the terms of the Regulatory Agreement concerning allocations to the Distribution Account, as therein defined.

In the event that distributions made in any year are less than the maximum percentage of equity permitted with respect to any such year, subject to the provisions governing contributions to the Distribution Account set forth in the Regulatory Agreement, the developer may accrue the deficiency with interest at the rate of 5% per annum, and cumulative deficiencies may be distributed in accordance with the provisions herein up to the maximum distribution allowed by law.

- (b) For ownership housing, to limit profit to all such partners or owners to no more than twenty percent of total allowable development costs, and such other sums as the Project Administrator may determine constitute a developer's contribution to the project, provided that calculation of total allowable development costs shall not include any fee paid to the developer.

By such a provision in the regulatory agreement the developer shall be deemed a "limited dividend organization" meeting the requirements in M.G.L. Chapter 40B Section 21.

The regulatory agreement shall be signed by the developer, the Project Administrator, the Department, any public or quasi-public entity which shall have responsibility for monitoring and enforcement of the regulatory agreement and use restriction, and any other party necessary for its implementation.

The developer shall be responsible for the cost of monitoring and enforcement of the regulatory agreement and the use restriction by the Project Administrator or other public or quasi-public entity approved by the Department. Provision shall be made in the regulatory agreement for such monitoring and enforcement during the term of affordability and for payment of the Project Administrator or other public or quasi-public entity providing such monitoring and enforcement. Any public or quasi-public entity providing the monitoring and enforcement shall be removable by the Department for cause. In the event of any such removal the entity so removed shall refund to the Project Administrator any payment made for future monitoring and enforcement services and such funds shall be paid to the Project Administrator or other replacement entity approved by the Department for such future monitoring and enforcement services.

13. Use Restriction

There shall be a use restriction in a form specified or approved by the Department. The use restriction and any regulatory agreement shall include provision for satisfaction of pertinent requirements, including:

- (a) The Project Administrator or other public or quasi-public entity approved by DHCD must be a holder of the restriction with the right and the obligation to monitor and enforce it during the term of affordability;
- (b) the restriction must provide for effective monitoring and enforcement by the Project Administrator which may enter into a contract for monitoring services with a public, quasi-public, or private entity experienced in affordable housing operation. The Project Administrator retains final responsibility for ensuring compliance with the restriction;

- (c) the restriction shall provide for selection of eligible tenants of rental units or owners of ownership units in a fair and reasonable manner in compliance with fair housing laws, and such tenants and owners shall be required to occupy the units as their domiciles and principal residences;
- (d) there shall be a term of affordability for as long as practically possible but for no less than 30 years.

For rental and cooperative housing projects, a regulatory agreement between the developer/owner/manager of a project, the Project Administrator and DHCD may incorporate the necessary use restriction. In homeownership projects, a regulatory agreement incorporating the use restriction will not by itself be sufficient since the units will be sold by the developer upon completion of the project. In such cases a separate use restriction shall be attached to each low or moderate-income unit in the form of a deed restriction or deed rider (as well as in a mortgage where appropriate). In homeownership projects, the use restriction on an affordable unit shall be renewed each time the unit is resold, although failure to do so shall not affect the validity of the restriction.

14. Income and Asset Limits

For tenants and purchasers household income shall not exceed 80% of area median income based on household size as determined by HUD, but lower limits may be set for tenants of rental housing or purchasers of ownership housing. For homeownership units, the household shall not have owned a home within three years preceding the application, with the exception of displaced homemakers and elderly households (where at least one household member is 55 or over). Household assets shall not exceed \$50,000 in value, provided that in the case of 55 or over or age restricted homeownership units the purchaser household may additionally own a dwelling (to be sold) in which the purchaser has no more than \$150,000 in equity. Assets may include net cash value after deducting reasonable costs that would be incurred in disposing of real property, savings, stocks, bonds and other forms of capital investment, excluding equity accounts in HUD homeownership programs or state assisted public housing escrow programs. The value of necessary items of personal property, such as furniture and automobiles shall be excluded. (See 24 CFR 5.603 (b)).

The Project Administrator or its designee for monitoring and enforcement shall be responsible for insuring that the income and asset eligibility requirements of potential renter households and potential homeowner households for low or moderate-income units have been met. For existing renters of such units the monitoring and enforcement entity shall be responsible for confirming such eligibility annually.

15. Affordability of Rental Units

Monthly rents payable by a household exclusive of utilities shall not exceed 30% of the gross monthly income of a household earning 70% of area median income based on household size as determined by HUD. If services are included in the monthly rent (e.g., in assisted living projects) and monthly rent exceeds the limit set forth in the previous sentence, the services must be clearly defined and sufficiently comprehensive to justify the additional amount of household income that must be devoted to rent. In the event a unit or a tenant receives a state,

federal or local subsidy, maximum rent may be as provided in the rent subsidy program so long as the tenants share of rent does not exceed the maximum set herein. If household income rises higher than 80% of area median income based on household size, rent shall be the higher of any such subsidized rent (including both the tenant share and subsidized portion) or 30% of actual household income.

16. Affordability of Ownership Units

Initial purchase prices shall be established so that appropriately sized households for a unit are not required to spend more than 30% of the gross income of a similarly sized household earning 70% of area median income based on household size, as determined by HUD, for annual debt service on a mortgage (at 30-year fixed-interest rates at the time of initial sale), taxes, homeowners insurance, mortgage insurance and condominium or homeowners fees with no more than a 5% down-payment, including any required entrance deposit. The maximum resale price shall be the initial purchase price increased by the percentage increase in area median income since the time of initial sale. In the event area median income shall have declined the maximum resale price shall be the initial purchase price. The procedure to be followed by a seller desiring to sell a unit shall be specified in the use restriction. The use restriction may permit an adjustment in selling price on account of closing costs and brokers' fees.

17. Land Valuation/Allowable Acquisition Costs

For purposes of calculating total development costs and profit, an independent appraisal is required to determine the allowable acquisition cost. Allowable acquisition cost shall not be unreasonably greater than the current appraised fair market value under existing zoning without a comprehensive permit in place. Economic benefits of the comprehensive permit shall accrue to the development and shall not be used to substantiate an acquisition cost that is unreasonably greater than fair market value under existing zoning.

Reasonable carrying costs incurred related to the real estate including interest, taxes, insurance, and the costs related to option agreements may be included as project expenses. If a building or improvement to be used in the project is located on the land, reasonable maintenance costs incurred after the date of application and security may be included as project expenses.

18. Fees

A separate fee schedule approved by the Department shall be established by the Project Administrator and shall be available on request. The fee schedule shall establish the fees payable by a developer. Fees shall be refunded in full if an application is not accepted or is rejected with the need for substantial review. One-half of the fee shall be refunded if an application is not approved.

19. Access to Records

The Project Administrator shall impose, as a condition in the use restriction and/or regulatory agreement for each approved project, the right of reasonable access to the developer/owner/manager's records necessary to monitor compliance with or to permit

enforcement of these guidelines. The developer/owner/manager shall be responsible for maintaining such records.

20. Marketing and Buyer/Tenant Selection

The developer shall devise a fair and reasonable plan for marketing of units and tenant or buyer selection. In general, tenant or buyer selection should be conducted by means of a lottery. With prior approval of the Project Administrator, the developer may contract with an experienced entity to conduct the marketing of units and the lottery. Before the lottery process commences, the developer must submit a lottery and marketing plan for approval by the Project Administrator. The Project Administrator will review the plan to ensure that the following matters are covered:

- Sales prices or rents of the affordable units (See Sections 15 and 16)
- Maximum income and asset eligibility of households applying for the affordable units (See Section 14)
- Marketing and outreach plan to ensure affirmative marketing will be undertaken
- Use restrictions to be used to ensure continued affordability of ownership units (See Section 13)
- Sample advertisements to be used and designation where ads will be placed

21. Setting Up the Lottery

Whenever possible the lottery should be collaboration between the municipality and the project developer supervised by the Project Administrator. In most cases, the developer, Project Administrator or an experienced entity approved by the Project Administrator will administer the lottery process (including the marketing and buyer or tenant selection), but the municipality shall have an active involvement if there will be a local preference. The developer shall pay for the costs of administering the lottery.

It is recommended that the municipality review the marketing and lottery plans and communicate any concerns to the Project Administrator prior to its final approval. In addition, the Zoning Board of Appeals (ZBA) in its Comprehensive Permit decision may choose to address such issues as who will be conducting the lottery, any local entity which must approve the lottery plan, what kinds of local preference, if any, will be given, and required outreach.

22. When to Conduct the Lottery

The lottery should be conducted after the expiration of all appeals of the Comprehensive Permit and other required permits or approvals not covered by the Comprehensive Permit.

For ownership units, activities leading up to the lottery activities should be scheduled to begin approximately 6 months prior to the anticipated date of occupancy of the first affordable unit.

Time is needed for activities such as outreach, advertising, conducting general workshops, and the mortgage application process.

Preference Categories

Municipalities collaborating in the lottery may specify that there be a local preference for up to 70% of the affordable units. The Zoning Board of Appeals in consultation with the local housing partnership or housing committee, the local housing authority, or other town boards should determine the types of local preference. The ZBA may delegate the determination of local preference to these other local agencies, especially the local housing partnership.

Typical local preferences are as follows:

(The following categories are equal in priority)

1. Current residents

- A household in which one or more members is living in the city or town at the time of application. Documentation of residency should be provided, such as rent receipts, utility bills, street listing or voter registration listing.

2. Family of Current Residents

- Close relatives, including children or parents, of a current resident of the city or town.

3. Municipal Employees

- Employees of the municipality, such as teachers, firefighters, police officers, librarians, or town hall employees.

4. Employees of Local Businesses

- Employees of businesses located in the municipality.

The developer and the municipality may negotiate other preference categories or variations of the above categories. However, to ensure that these preferences do not violate applicable fair housing laws, the following procedure should be followed:

A lottery for projects including a local preference should have two applicant pools: a local preference pool and an open pool. After the application deadline has passed, the municipality should determine the number of local resident minority households in the municipality and the percentage of minority applicants in the local preference pool. If the percentage of minorities in local resident households and in the local preference pool is less than the percentage of minorities in the surrounding HUD-defined area, the municipality should make the following adjustments to the local preference pool:

The municipality should hold a preliminary lottery comprised of all minority applicants who did not qualify for the local preference pool, and rank the applicants in order of drawing. Minority applicants should then be added to the local preference pool in order of their rankings until the percentage of minority applicants in the local preference pool is equal to the percentage of minorities in the surrounding HUD-defined area. Applicants should be entered into all pools for which they qualify. For example, a local resident should be included in both pools.

Minorities should be identified in accordance with the regulatory classifications established by HUD, which are: Native American or Alaskan Native; Asian or Pacific Islander; African-American; Hispanic/Latino; or Cape Verdean.

If the project includes units accessible or adaptable for occupancy by physically disabled persons in conformity with requirements of G.L. c.22 §13A and the Architectural Access Board, preference for those units shall be given to such physically disabled persons.

23. Steps in the Lottery Process

Step 1: Determining Basic Qualifications

The following standards should generally be used for lottery qualification:

- a) Total household gross income shall not exceed 80% of the area median income, based on household size, as defined by the US Department of Housing and Urban Development (HUD). Annual income shall be determined in the manner set forth in 24 C.F.R. 5.609 (or any successor regulations). Income limits shall be adjusted annually to reflect the HUD figures in effect at the time. A "household" is two or more persons who will live regularly in the unit as their primary residence and who are related by blood, marriage, law, or who have otherwise evidenced a stable inter-dependent relationship, or an individual.
- b) The household shall not have owned a home within three years preceding the application, with the exception of displaced homemakers and elderly households (where at least one household member is 55 or over).
- c) The household shall have sufficient funds for a down payment and closing costs, as determined by the developer and the participating lender.

- d) Household size shall be appropriate for the number of bedrooms in the dwelling unit. It is necessary to set a minimum and maximum household size for the units. For example, a minimum household size of 2 persons is necessary for two bedroom units, and three and four bedroom homes need larger households. Maximum household size may be set in accordance with the State Sanitary Code or applicable local laws.
- e) Household income shall be sufficient to support at least 50% of the price of the home. No more than 50% of the purchase price shall be cash.
- f) Household assets shall be defined in the manner by which HUD determines assets for the purposes of attribution of income. (See 24 CFR 5.609).
- g) Non-household members shall not be permitted as co-signers of the mortgage.
- h) Individuals who have a financial interest in the development and their families shall not be eligible to participate in the lottery.

Step 2: Materials for Applicants

The developer shall prepare complete application materials, including an application form, application certification form, authorization for consent to release information, description of the use restriction, a description of the eligibility requirements, and a clear description of the preference system being used and how the lottery winners will be chosen. The materials shall be approved by the Project Administrator prior to their use.

Step 3: Advertising and Outreach

Affirmative fair marketing of all the affordable units shall be conducted to provide maximum opportunity for low and moderate-income households, including minority households, to apply for the lottery. Typically, ads will be placed in local and regional newspapers, Boston area newspapers, and minority newspapers. Notices should be sent to local fair housing commissions, area churches, local and regional housing agencies, local housing authorities, civic groups, lending institutions, social service agencies, and other non-profit organizations.

If the municipality is collaborating in the lottery the municipality should offer one or more “workshops” for members of the public to educate them about the lottery process. These workshops may include local officials, lottery administrators, developers, and local bank or finance officials. The date, time, and location of these workshops should be published in ads or flyers that publicize the availability of lottery applications. The workshops are usually held in a municipal building, school, library, or public meeting room. Workshops are usually held in the evening or on weekend days in order to reach as many potential applicants as possible. Attendance at a workshop should not be a precondition of the approval of a lottery application.

The purpose of the workshop is to answer questions that are commonly asked by lottery applicants. Usually a municipal official will welcome the participants and describe the municipality’s role in the affordable housing project. The lottery administrator will then explain the information requested on the application and answer questions about the lottery drawing process. The developer should be present to describe the development and to answer specific questions about the affordable units. It is helpful to have a local banker or financial representative present to answer questions about qualifications for the financing of affordable

units. The number of workshops needed is usually determined by the level of interest about the development.

Complete application materials shall be readily available to potential lottery applicants.

Sales prices must be “locked-in” at the time of the initial marketing of the affordable homeownership units. Thereafter, the prices of the homes should not be increased for lottery winners, even if interest rates and HUD income guidelines change.

Step 4: Documentation

Applicants for the lottery should be required to submit all of the required materials by a specified deadline. The application period should be at least 60 days. The level of documentation required from the applicant may vary. Some lotteries allow an applicant to “self-qualify” based on reliable information submitted at the workshops. Other lotteries require that applicants obtain a “pre-qualification” letter from a lender and submit verified documentation (e.g. income tax returns) to be eligible for the lottery. Whatever method is chosen, only applicants who are income and asset eligible and who submit all required information should be entered into the lottery.

Step 5: Lottery Selection

Once all required information has been received, each qualified applicant should be assigned a registration number. Ballots with the registration number for applicant households are placed in each and all lottery pools in which they qualify. The ballots are randomly drawn for both of the pools and placed in the order drawn (an applicant in more than one pool would likely have a different rank in each pool.) If a project has units with different numbers of bedrooms, the various unit types should be distributed proportionately between the two lottery pools. Units are then awarded (largest units first) by proceeding down the list of lottery winners to the first household on the list which is of appropriate size for the largest unit available according to the appropriate-unit-size criteria established for the lottery. Once all larger units have been assigned to appropriately sized households in this manner, the selection order returns to the top of the list and selects appropriately sized households for smaller units. This process continues until all available units have been assigned to appropriately sized applicant households. Remaining unselected households will be selected in the same manner should alternate buyers be needed. If the local preference pool requires adjustment as described in Section 23, the preliminary lottery should be conducted before the final lottery is conducted.

Step 6: Loan Application

Once the lottery has been completed, applicants selected to purchase units will be given a reasonable pre-specified time period in which they must secure financing. It is helpful to invite the lottery winners to a loan application workshop often held at a lender’s office. It is helpful for a developer to make prior arrangements with local financial institution[s] with respect to financing qualified purchasers. Often such an institution is prepared to make a preliminary approval of a loan. Once it makes such a preliminary approval of a loan, the applicant will then contact the developer and enter into a Purchase and Sale Agreement. The executed Purchase and Sale Agreement will then be submitted to the lender which will issue a firm financing commitment.

Step 7: Final Qualification and Closing

Once a Purchase and Sale Agreement has been signed, the developer or lender should submit income and asset documentation of the applicant to the Project Administrator. Income verification should include verified tax returns from the past year, a recent pay stub and reliable documentation as to other sources of income and assets. The Project Administrator will then verify that the household's income does not exceed 80% of the area median income. It shall also verify that household assets do not exceed the maximum allowable.

After closing on the sale of a unit, the developer should provide the Project Administrator or designee with a copy of the deed and use restriction and evidence of recording.

24. Waiver

Any provision of these guidelines may be waived by the Director of the Department for good cause provided that any such waiver shall be consistent with applicable program requirements.